

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

COMMSCOPE, INC.,	.
	.
Plaintiffs,	.
	.
vs.	.
	.
ROSENBERGER TECHNOLOGY	.
KUNSHAN CO., LTD., et al.,	.
	.
Defendants.	.

Case No. 19-cv-15962  
Newark, New Jersey  
January 25, 2024

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE LEDA DUNN WETTRE  
UNITED STATES MAGISTRATE JUDGE

This transcript has been reviewed and revised in accordance with L. Civ. R. 52.1.

This transcript has been **SEALED (AVAILABLE FOR PARTIES; NOT AVAILABLE FOR THE PUBLIC)** pursuant to Loc. Civ. R. 5.3(c)(2).

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I N D E X

	<b>Page</b>
Proceedings	5
The Court's ruling on Issue 1: Yang, Linfeng document production	18
The Court's ruling on Issue 2: Production of HR information	36
The Court's ruling on Issue 3: Satimo Macro Generator	50
The Court's ruling on Issue 4: No decision rendered	53
The Court's ruling on Issue 5: Data breach information	70
The Court's ruling Issue 6: Production of PowerShell script	93
The Court's ruling on Issue 7: Deposition Testimony of Bisiules	98

|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

5

1 (Commencement of proceedings)

2 THE COURT: Okay. We are on the record in  
3 CommScope Inc., et al., versus Rosenberger Technology, et  
4 al., 19-cv-15962.

5 I am Magistrate Judge Wettre. We're here for oral  
6 argument on discovery disputes.

7 And may I have appearances, please, starting with  
8 the plaintiffs.

9 MR. SPONZILLI: Thank Your Honor. Edward Sponzilli  
10 of the law firm Norris McLaughlin. We're local counsel to  
11 the plaintiffs.

12 THE COURT: Good afternoon, Mr. Sponzilli.

13 MS. SALMON-SMITH: Good morning, Your Honor.  
14 Tracey Salmon-Smith. I'm with Faegre Drinker Biddle & Reath  
15 here in New Jersey.

16 THE COURT: Good afternoon.

17 MS. MAPPES: Harmony Mappes, Your Honor. Also with  
18 Faegre.

19 THE COURT: Good afternoon to you.

20 MR. KAHNKE: Randy Kahnke, Your Honor. Also with  
21 Faegre.

22 THE COURT: Good afternoon.

23 MR. KAHNKE: Good afternoon.

24 THE COURT: And --

25 MS. SALLSTROM: Anna Sallstrom with Faegre.

|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

6

1 THE COURT: Okay.

2 MR. WASHBURN: Bryan Washburn also with Faegre.

3 THE COURT: Okay. Welcome. And if you'd rather  
4 sit in the jury box, that's okay too. If you want to be  
5 closer to your co-counsel. It doesn't matter to me. Yeah,  
6 we short-changed you on the table, I see.

7 All right. And for defendants?

8 MR. EICHHORN: Your Honor, Daniel Eichhorn from  
9 Cullen and Dykman. I'm local counsel.

10 THE COURT: Okay. Good afternoon.

11 MR. MILLER: Daniel Miller from King & Wood  
12 Mallesons.

13 THE COURT: Good afternoon.

14 MS. HE: Good afternoon. Yi He, also with King &  
15 Wood Mallesons.

16 THE COURT: Good afternoon.

17 MR. SKLAR: Andrew Sklar from King Wood Mallesons.

18 THE COURT: Okay. Good afternoon.

19 MR. PELLEGRINO: Nick Pellegrino from King Wood &  
20 Mallesons.

21 THE COURT: Good afternoon.

22 MR. FILARDO: Good afternoon, Your Honor. Vincent  
23 Filardo Jr. from King Wood Mallesons.

24 THE COURT: Okay. Good afternoon to you.

25 All right, everyone.

Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

7

1           So just for the record, I'll just state the docket  
2 numbers of the joint submissions I received on discovery. I  
3 have before me ECF 562 and ECF 566. I also have two books of  
4 exhibits that correspond to each of the letters. And I just  
5 wanted to let you know I have thoroughly read everything more  
6 than once, and digested it. So you can save time in going  
7 through basics. You do not have a cold bench today or an  
8 unprepared one.

9           So what I've done in all honesty is I've taken the  
10 issues and I've mapped out an oral opinion after considering  
11 and reconsidering and looking at cases.

12           That said, I do keep an open mind for oral  
13 argument; otherwise, I wouldn't bother dragging you in here.  
14 So I'll have you argue each issue. I'm figuring -- it has to  
15 be a short amount of time per issue -- maybe five minutes, go  
16 to the heart of it and don't waste time on the edges.

17           And then I will take a look silently at my oral  
18 opinion and see if I want to modify it based upon what I've  
19 heard. I will likely ask you some questions; more on some  
20 issues than others.

21           And then, you know, we can certainly take a break  
22 or two -- I'll probably need one and just to give you all a  
23 break.

24           I was in the Supreme Court watching argument on the  
25 Chevron issue last week -- I think it was last week and not

|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

8

1 the week before. And Justice Thomas had to take a break, and  
2 Chief Justice Roberts didn't even stop for him. They went  
3 for two hours and 15 minutes, and I thought, boy, I'd like to  
4 get up and leave like Justice Thomas.

5 So I won't do that to you today.

6 All right. So that said, I'm going to take the  
7 issues in the order in which you submitted them. So we'll  
8 start with, you know, the one meatily briefed issue in  
9 ECF 562. It is really CommScope's "ask," if you will; so  
10 I'll hear from CommScope on that first issue for about five  
11 minutes, and then turn it over to Rosenberger.

12 MS. MAPPES: Thank you, Your Honor.

13 THE COURT: And, Ms. Mappes, wherever you're  
14 comfortable. I am not offended if you stay at counsel table.  
15 You can come up to the podium. I'm sorry that I don't have a  
16 shelf for you.

17 MS. MAPPES: I'll come up, Your Honor. That will  
18 be just fine.

19 THE COURT: All right. Very good.

20 MS. MAPPES: One quick housekeeping note, we  
21 typically have sealed --

22 THE COURT: Yes, thank you. Thank you. I had it  
23 right on the top of my notes.

24 MS. MAPPES: So did I.

25 THE COURT: So everyone in the courtroom now -- and



|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

9

1 I'll ask counsel to look around -- is privy to all of the  
2 information marked confidential and highly confidential under  
3 the confidentiality order?

4 MS. MAPPES: Yes, Your Honor.

5 THE COURT: I see a lot of nodding heads. Okay.

6 So I'm going to seal not only the record but the  
7 courtroom because this hearing will discuss extensive  
8 information of the parties that was marked confidential or  
9 highly confidential pursuant to the confidentiality order  
10 that the Court entered.

11 So rather than formally locking the door, just you  
12 all keep an eye on the door, and if somebody wanders in who  
13 you don't know to be privy to confidential information, just  
14 give me a wave. Okay?

15 MS. MAPPES: Thank you, Judge.

16 THE COURT: Go ahead, Ms. Mappes.

17 MS. MAPPES: Good afternoon, and may it please the  
18 Court. I'm Harmony Mappes for CommScope on Issue Number 1.

19 Production of CommScope's BSA component design  
20 files is core foundational discovery that was to be done and  
21 that was ordered at the very outset of discovery, yet  
22 CommScope learned for the first time in depositions [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]

8 And, of course, these employees can have no privacy  
9 interests in CommScope's trade secret information, which is  
10 all CommScope is seeking from these devices. As the case law  
11 we rely on explains, an employer should not be able to shield  
12 itself from discovery by claiming it has no control over  
13 work-related materials on an employee's personal account or  
14 device. Such a rule could have the potential to incentivize  
15 employers to require the use of personal accounts for  
16 business purposes. And this would cut against the federal  
17 rules which allow for broad discovery and would inhibit the  
18 resolution of cases on their merits.

19 These sorts of perverse incentives are acute in a  
20 case like this, Your Honor, where if Rosenberger is allowed  
21 to shield these documents, [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]. That cannot  
25 be how this works.

1 I'd also like to address the cost-shifting  
2 argument, Your Honor. [REDACTED]  
3 [REDACTED]  
4 [REDACTED] but only if CommScope  
5 pays the cost of restoring, searching, and hosting the data.  
6 Had Rosenberger searched for and produced these documents  
7 during the course of document discovery, as they, through  
8 their prior counsel, represented to us and to the Court that  
9 they would do, these costs would not even exist.

10 I would also direct your attention to Exhibit 26;  
11 it's the last exhibit. This is a quote from Rosenberger's  
12 e-discovery vendor, and it says -- and I'll just quote one  
13 sentence, Your Honor --

14 THE COURT: Just let me catch up with you.

15 MS. MAPPES: Absolutely.

16 THE COURT: Okay.

17 MS. MAPPES: And I'll quote the sentence,  
18 Your Honor, just the one-page document [REDACTED]

19 [REDACTED]  
20 [REDACTED]. End  
21 quote.

22 Yet Rosenberger is asking for [REDACTED]  
23 [REDACTED]  
24 [REDACTED] Rosenberger cannot meet its burden here to shift  
25 these costs to CommScope.

1           In sum, we respectfully request that the Court  
2 order Rosenberger to produce CommScope's trade secret design  
3 files regardless of where they were stored. CommScope also  
4 requests additional deposition time to address these issues.

5           I'm happy to answer any questions, of course, but  
6 I'll leave it there.

7           THE COURT: Okay. Thank you, Ms. Mappes.

8           I have no questions.

9           MS. MAPPES: All right.

10          MR. FILARDO: Good afternoon, Your Honor. Vincent  
11 Filardo from King and Wood Mallesons.

12          Briefly, I'd like to first address the issues  
13 related to Mr. Yang and his computer, and then I'll address  
14 the issues related to Sheng Linfeng. And that's the employee  
15 who would need to have his data restored in order to search  
16 it.

17          So with respect to Mr. Yang, Your Honor, to the  
18 extent there are any CommScope documents on his personal  
19 laptop, that would have occurred while he was an employee at  
20 CommScope. There is nothing in the record and we have found  
21 no evidence that suggests he ever used that laptop while he  
22 was at Rosenberger. And, indeed, he was issued a Rosenberger  
23 laptop and also worked at a Rosenberger workstation.

24          And those documents have all been searched, and all  
25 responsive documents --

1 THE COURT: Can I stop you for a moment.

2 MR. FILARDO: Sure.

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED] So he has a laptop at Rosenberger that was  
12 issued to him. He has a workstation, and he has his own  
13 email files at the company. Those were all searched, and all  
14 responsive documents related to them were produced, including  
15 any documents that were CommScope -- originated CommScope  
16 documents. That was all produced. And that's clearly the  
17 best -- the best location to determine where any CommScope  
18 documents would be if Rosenberger had them in their  
19 possession.

20 So that is the issue -- one of the main issues here  
21 is that we have searched for them. We did not ignore them.

22 [REDACTED]

23 [REDACTED]

24 [REDACTED].

25 THE COURT: Okay.

1 MR. FILARDO: Now, the issue arises again whether  
2 or not we have that kind of access to his laptop. And even  
3 the cases that CommScope cites to -- I think it's the In re  
4 Skanska case, which is a Northern District of Florida case,  
5 and that case was rather aggressive in allowing a personal  
6 device of an employee to be accessible. Even the court there  
7 found that it didn't require the company to actually search  
8 that device. It required the company to ask the employee to  
9 search it so as to leave no doubt that there would not be any  
10 access to personal information and private information.

11 But I don't think the Court needs to go that far  
12 here, Judge, because we've looked at the stuff that Mr. Yang  
13 had brought to CommScope -- and Rosenberger. And that's been  
14 produced to CommScope.

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]

20 THE COURT: Where is that?

21 MR. FILARDO: That is not -- that is not produced  
22 to the Court, Your Honor. That has not been produced. This  
23 is in the record, though.

24 Essentially they ask -- [REDACTED]  
25 [REDACTED]

|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

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2

THE COURT: When was this interrogatory answered

3

4

5

MR. FILARDO: Interrogatory -- the verification is

6

dated January 24, 2020. The actual responses and objections

7

are dated January 17, 2020. .

8

9

--

10

THE COURT: Is that in your submission?

11

MR. FILARDO: They aren't, Your Honor. These --

12

THE COURT: They are or aren't?

13

MR. FILARDO: They are not. These are --

14

THE COURT: Are they referenced in 562, the joint

15

dispute letter?

16

MR. FILARDO: They are not, Your Honor. These are

17

issues that we discovered after our submissions to

18

determine -- you know, in response to some of the assertions

19

that were made in reply in the joint submission.

20

So he was identified in that document as well as an

21

.

22

And, moreover, Your Honor, I think more --

23

THE COURT: Was he identified in the negotiations

24

of the ESI order that was entered in January 2021 as a person

25

who should be a custodian for those searches?

1 MR. FILARDO: He was also identified in that too.

2 In CommScope --

3 THE COURT: Why didn't you put it in your  
4 submission?

5 MR. FILARDO: Your Honor --

6 THE COURT: I prepared many hours for this. And  
7 now I'm hearing new information while you're on your feet?

8 MR. FILARDO: I apologize for that, Your Honor.  
9 But I think the issue was more that since we were willing to  
10 try to agree with CommScope to produce the stuff if they  
11 would shift the cost, that it wouldn't be necessary to burden  
12 the Court with that.

13 But after their reply came in where they made  
14 several assertions that they didn't know about this guy, I  
15 thought it was appropriate for us to identify this to the  
16 Court.

17 THE COURT: Okay.

18 MR. FILARDO: And I think -- I think more important  
19 than even the interrogatories and the letter from Milbank is  
20 that when the parties were negotiating the custodian list,  
21 CommScope had in their proposed custodian list identified  
22 Mr. Sheng Linfeng as one of, I think, 55 custodians at the  
23 time. He was Number 36.

24 Ultimately, the parties agreed to a smaller subset  
25 of that, and he was not in that subset. He was taken out by



1 CommScope.

2 So when it came to this Court and Your Honor I  
3 believe there were -- I think it was 21 that we could agree  
4 on and then another 14 that CommScope wanted for a total of  
5 35 and then ultimately Your Honor allowed another seven, so a  
6 total of 28.

7 And even in those 14 that CommScope had requested  
8 from the Court, they didn't request Mr. Sheng Linfeng. He  
9 was taken out from their original custodian list.

10 So I am -- was taken aback by some of the  
11 assertions that they didn't know about him and that we were  
12 unwilling to -- that we should have --

13 THE COURT: Well, you ought to have put that in  
14 your submission if you were taken aback.

15 MR. FILARDO: It was after the fact that I saw the  
16 reply.

17 THE COURT: Thank you.

18 Ms. Mappes, will you respond to that? Just the  
19 point about Linfeng, [REDACTED]

20 [REDACTED].

21 MS. MAPPES: Yes, Your Honor. [REDACTED]

22 [REDACTED] does not make any  
23 difference. Everybody understood at the time -- indeed,  
24 according to Rosenberger's prior counsel, targeted  
25 collections were going to happen to get design files

1 regardless because they're not susceptible to search terms.

2 As Your Honor knows, we had lot of back-and-forth;  
3 we had multiple hearings about this. And part of the reason  
4 we could take some of those custodians off the list was  
5 because Rosenberger's prior counsel represented, "We are  
6 doing targeted collections. We understand that design files  
7 do not always show up in searches."

8 And we fully understood that they were collecting  
9 all of our design files regardless of where they were.

10 THE COURT: Okay. All right. Thank you.

11 Please sit down.

12 Let me just go through my notes on this.

13 (Pause in proceedings)

14 THE COURT: Okay. Before the Court are several  
15 discovery disputes briefed by the parties prior to this  
16 hearing at ECF Numbers 562 and 566.

17 I have just heard oral argument on the first issue,  
18 which was presented in ECF 562. I am ready to issue my  
19 ruling on that.

20 But, first, a brief bit of background.

21 This is an action in which CommScope contends that  
22 its trade secrets concerning base station antennas were  
23 misappropriated by defendants, who are competitors in the BSA  
24 market, in violation of several statutes. See the Amended  
25 Complaint at ECF 50. I will jointly refer to the defendants

1 as "Rosenberger."

2 A primary way in which CommScope contends trade  
3 secrets were misappropriated by Rosenberger is through former  
4 CommScope employees who brought the alleged trade secrets to  
5 Rosenberger when they subsequently became employed there.  
6 See ECF 50, paragraphs 47 to 52.

7 The Court has been supervising discovery in this  
8 action since 2019 and has had several lengthy hearings to  
9 resolve disputes and, as such, is very familiar with the  
10 issues in this action and the history of discovery.

11 Under the most recently entered case management  
12 order pertaining to fact discovery, written discovery closed  
13 April 27th, 2023, and even that period was provided solely  
14 for supplementing written discovery, given the prior years of  
15 document discovery that were afforded to the parties. And  
16 deposition discovery closed on November 17th, 2023. See the  
17 Case Management Order at ECF 530.

18 The first issue in dispute before the Court  
19 concerns two of the former CommScope and now-Rosenberger  
20 employees, Charles Yang and Sheng Linfeng. CommScope seeks  
21 an order compelling [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]. CommScope further seeks, after production of such

|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

20

1 information if it is ordered, Linfeng's deposition and an  
2 additional deposition of Yang and/or additional time to  
3 depose Rosenberger's 30(b)(6) witness concerning the newly  
4 produced information.

5 The relevant factual background of the dispute is  
6 this: [REDACTED]

7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

1 First, the Court finds that the information sought  
2 is relevant and proportional within the meaning of Rule 26.  
3 The Court has previously held that Rosenberger's possession  
4 of CommScope's design files is highly relevant to CommScope's  
5 claims of trade secret misappropriation. CommScope alleges  
6 that much of the misappropriated information came through its  
7 ex-employees subsequently becoming employed at Rosenberger,  
8 [REDACTED], and bringing CommScope  
9 information with them, [REDACTED]  
10 [REDACTED].

11 Moreover, production of these CommScope design  
12 files is proportional to the needs of the case. All the  
13 information sought is highly targeted, and even if resources  
14 need to be expended to produce it, given the -- and I'm  
15 paraphrasing the proportionality factors of Rule 26(b)(1) --  
16 given the importance of the issues at stake in the action,  
17 the amount in controversy, and the importance of the  
18 discovery in resolving the issues, it is proportional within  
19 the definition set forth in 26(b)(1).

20 Second, the Court finds that CommScope has met its  
21 burden of demonstrating that the information on Yang and  
22 Linfeng's personal devices is within Rosenberger's control,  
23 even if not all of it is within its custody or possession  
24 under Rule 34. Control is defined -- and this is a quote --  
25 "control is defined as the legal right, authority, or ability

1 to obtain documents upon demand." Camden Iron and Metal Inc.  
2 v. Marubeni America Corp., 138 F.R.D. 438 at page 441, a  
3 District of New Jersey opinion from 1991.

4 Federal courts have construed the definition of  
5 "control" broadly under Federal Rule of Civil Procedure 34.  
6 See id.

7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]. See ECF 562 at 5.  
14 Thus, it is an open question.

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]. See Exhibit 8. Nothing in the  
20 briefing from Rosenberger states that Yang has or would  
21 refuse to provide the information from -- the CommScope  
22 information upon his personal devices to Rosenberger, if  
23 requested. To the contrary, [REDACTED]  
24 [REDACTED]  
25 [REDACTED]. See ECF 562 at 16.

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]. This is so regardless of the  
8 fact that the devices were not issued by Rosenberger. See  
9 matter of Skanska, 2021 WL 4953239 at \*3, a Northern District  
10 of Florida opinion from August 5, 2021, which says -- and I  
11 quote: "An employer has control of a current employee and  
12 the legal right to obtain business communications from a  
13 current employee regardless of whether the communication is  
14 located on a personal cell phone." See also Mirlis v. Greer,  
15 80 F.4th 377 at page 382, a Second Circuit decision from  
16 2023, holding that a lack of physical possession does not  
17 denote a lack of control under Rule 34.

18 To that end, an employer may not shield itself in  
19 potential litigation by "simply maintaining anything  
20 potentially discoverable in an employee's personal email  
21 account ... Such evasive measures would cut against the  
22 purpose of the federal civil rules that allow for broad  
23 discovery." And that is from State Farm v. Precious Physical  
24 Therapy, 2020 WL 7056039 at \*6, n.4, an Eastern District of  
25 Michigan decision from December 2, 2020.

1           The Court therefore concludes that Rosenberger has  
2 sufficient control over the specific and highly relevant  
3 content that CommScope seeks and must produce it.

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]. Accordingly, control is not at issue  
9 here, and Rosenberger does not rely on any other basis beyond  
10 the purported cost to resist producing what is clearly  
11 discoverable information.

12           As for cost shifting, the Court will address this  
13 in a little while.

14           Third, I do not find that CommScope waived any  
15 right to seek this information. In an effort not to unduly  
16 burden Rosenberger in discovery, the Court cabined the scope  
17 of the discovery available to CommScope early on, requiring  
18 an iterative approach to searching Rosenberger's records for  
19 allegedly misappropriated design files. The Court repeatedly  
20 assured the parties, in denying certain broad requests for  
21 discovery, that as discovery unfolded and revealed additional  
22 potential sources of information, the Court would allow  
23 discovery to be expanded to those areas accordingly and in a  
24 targeted manner.

25           That is exactly what occurred here where CommScope



1 learned at depositions in the fall of 2023 that [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]. The Court rejects Rosenberger's arguments that  
6 CommScope slept on its rights.

7 To the extent that Rosenberger argues that  
8 CommScope should have found through its own servers that Yang  
9 and Linfeng sent the files to their personal devices while  
10 they were still CommScope employees, the Court finds this  
11 argument ignores that CommScope had deleted those employees'  
12 email accounts in the ordinary course of business before this  
13 litigation commenced.

14 The Court therefore orders Rosenberger to produce  
15 all CommScope design files of Linfeng in its possession and  
16 that are found on Yang's and Linfeng's personal devices.

17 Finally, the Court rejects Rosenberger's request to  
18 shift costs of this production onto CommScope. The  
19 presumptive rule is that parties pay for their own production  
20 of information. Cost-shifting is appropriate only for  
21 inaccessible data, which archived data is not considered to  
22 be. See Juster Acquisition Company v. North Hudson Sewerage  
23 Authority, 2013 WL 541972 at \*3, a District of New Jersey  
24 decision from February 11, 2013. And even if the data were  
25 considered inaccessible, the fact that Rosenberger rendered

1 it inaccessible by archiving information it knew to be  
2 directly relevant and responsive to CommScope's discovery  
3 requests during discovery in this action is on Rosenberger.  
4 Rosenberger's decision to take highly relevant information  
5 and make it time-consuming and expensive to retrieve was its  
6 own erroneous judgment, and CommScope should not literally  
7 have to pay the price for it.

8 CommScope may also depose Yang and Linfeng and/or  
9 Rosenberger's 30(b)(6) designee about the design files after  
10 they are produced.

11 I will not prejudge how much time CommScope is  
12 allotted as we do not yet know the extent of the information  
13 that will be produced. The parties are to meet and confer  
14 about that at the appropriate time after the documents or  
15 electronically stored information is produced.

16 Okay.

17 Let's go to Issue 2. It's a CommScope "ask," so  
18 CommScope may argue it first.

19 MR. WASHBURN: Good afternoon, Your Honor. Bryan  
20 Washburn from Faegre Drinker on behalf of CommScope.

21 Issue Number 2 is asking the Court to issue an  
22 order directing Rosenberger to produce its HR investigation  
23 and subsequent disciplinary records for its employees [REDACTED]

24 [REDACTED]  
25 [REDACTED]. That investigation conducted

|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

27

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]

8           Rosenberger's argument that the information is not  
9 responsive to a particular RFP is also incorrect. We've  
10 identified a series of RFPs that it would be responsive to,  
11 most particularly RFP Number 17, which even defendants  
12 concede [REDACTED]  
13 [REDACTED]  
14 [REDACTED].

15           That's what we have here. [REDACTED]

16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19           Rosenberger's other arguments to prevent producing  
20 the information are meritless. Their argument that the  
21 information is -- there's privacy rights or -- go ahead.

22           THE COURT: Let me ask you, what's the relevance of  
23 this information?

24           MR. WASHBURN: The information is relevant both to  
25 show misappropriation -- [REDACTED]

Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

28

1	[REDACTED]
2	[REDACTED]
3	[REDACTED]
4	[REDACTED]
5	[REDACTED]
6	[REDACTED]
7	[REDACTED]
8	[REDACTED]
9	[REDACTED]
10	[REDACTED]
11	[REDACTED]
12	[REDACTED]
13	[REDACTED]
14	[REDACTED]
15	[REDACTED]
16	[REDACTED]
17	[REDACTED]
18	[REDACTED]
19	[REDACTED]
20	[REDACTED]
21	[REDACTED]
22	[REDACTED]
23	[REDACTED]
24	[REDACTED]
25	[REDACTED]

|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

29

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]

10 THE COURT: Understood.

11 MR. WASHBURN: Okay.

12 THE COURT: Thank you. You can -- last word.

13 MR. WASHBURN: Nothing further, Your Honor, unless  
14 you have other questions.

15 THE COURT: Okay. No.

16 MR. WASHBURN: Thank you so much.

17 THE COURT: Thank you.

18 All right. Who's got this one?

19 Please just repeat your name for the record.

20 MS. HE: Hi, Your Honor. Yi He on behalf of the  
21 defendants.

22 THE COURT: Okay. Please spell it for the court  
23 reporter, or they'll be back to me asking.

24 MS. HE: Of course. First name, Y-i. Last name,  
25 H-e.

1           On behalf of defendants to argue Issue Number 2,  
2 the requests made by the plaintiffs are not relevant nor  
3 proportional to the needs of this case in light of all the  
4 discovery the parties have had over the years. And more  
5 importantly, it intrudes upon the privacy interests of the  
6 employees.

7           At no --

8           THE COURT: What if we redacted the names -- you  
9 redacted initially the names of the employees? Or -- I'm  
10 sorry. That wouldn't help CommScope identify [REDACTED]

11 [REDACTED].

12           If it was stamped as confidential pursuant to the  
13 confidentiality order and only the lawyers in this case could  
14 see the [REDACTED]

15 [REDACTED]

16 [REDACTED]

17           MS. HE: Respectfully, no, Your Honor. The reason  
18 is because, first of all, at nowhere during the 30(b)(6)  
19 deposition [REDACTED]

20 [REDACTED].

21 [REDACTED]

22 [REDACTED]

23           THE COURT: Tell me where it is so I can follow  
24 along.

25           MS. HE: Of course.

|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

31

1 THE COURT: By Bates stamp?

2 MS. HE: It's in the deposition of this 30(b)(6)  
3 witness. It's on page 452. And I'm looking at lines 10 to  
4 13.

5 THE COURT: Sorry. Which exhibit?

6 MS. HE: It's Exhibit AA to the --

7 THE COURT: AA?

8 MS. HE: Yes.

9 THE COURT: Okay. Give me a second.

10 MS. HE: I'm sorry, Your Honor. It's Exhibit A.

11 THE COURT: Exhibit A.

12 And tell me again the page?

13 MS. HE: It's page 452. And I'm looking at  
14 lines 10 to 13.

15 THE COURT: Okay.

16 MS. HE: [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

32

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 THE COURT: [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 THE COURT: [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]



Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

33

1	[REDACTED]
2	[REDACTED]
3	[REDACTED]
4	[REDACTED]
5	[REDACTED]
6	[REDACTED]
7	[REDACTED]
8	[REDACTED]
9	[REDACTED]
10	[REDACTED]
11	[REDACTED]
12	[REDACTED]
13	[REDACTED]
14	[REDACTED]
15	[REDACTED]
16	[REDACTED]
17	[REDACTED]
18	[REDACTED]
19	[REDACTED]
20	[REDACTED]
21	[REDACTED]
22	[REDACTED]
23	[REDACTED]
24	[REDACTED]
25	[REDACTED]

Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

34

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

35

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[REDACTED]

THE COURT: Okay. I understand your argument.  
Thank you.

MS. HE: Thank Your Honor.

THE COURT: Mr. Washburn, just briefly, yeah.

MR. WASHBURN: Brief, Your Honor. Thank you.

Your Honor, I just want to make a few points.

What I heard from Ms. He's argument is they're no  
longer arguing the information isn't responsive to a  
particular discovery request. They're relying solely on  
relevancy.

As I explained in my argument, the information is  
relevant [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

THE COURT: Okay.

MR. WASHBURN: Thank you for your time.

THE COURT: Thank you.

There were a number of different answers because  
different entities were named. I did look at affirmative

|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

36

1 defenses in some of the answers.

2 Is it the same affirmative defense across all the  
3 Rosenberger answers --

4 MR. WASHBURN: This is for the main three  
5 affirmative -- main three defendants. I believe it's  
6 Docket 462, and it's the fifteenth affirmative defense.

7 THE COURT: Which went to its [REDACTED]

8 [REDACTED]  
9 MR. WASHBURN: [REDACTED]

10 [REDACTED]

11 THE COURT: All right. Give me a moment, please.

12 MR. WASHBURN: Thank you, Your Honor.

13 (Pause in proceedings)

14 THE COURT: Okay. [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

37

1	[REDACTED]
2	[REDACTED]
3	[REDACTED]
4	[REDACTED]
5	[REDACTED]
6	[REDACTED]
7	[REDACTED]
8	[REDACTED]
9	[REDACTED]
10	[REDACTED]
11	[REDACTED]
12	[REDACTED]
13	[REDACTED]
14	[REDACTED]
15	[REDACTED]
16	[REDACTED]
17	[REDACTED]
18	[REDACTED]
19	[REDACTED]
20	[REDACTED]
21	[REDACTED]
22	[REDACTED]
23	[REDACTED]
24	[REDACTED]
25	[REDACTED]

|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

38

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Rosenberger shall produce this information as requested.

All right. Issue 3.

CommScope's again.

MS. SALLSTROM: Thank you, Your Honor. This is Anna Sallstrom of Faegre. I'm here on behalf of CommScope, and I'll address Issue Number 3, which relates to Satimo Macro Generator.

And I'll preview that, as we've alerted the other side, I have additional information to share that makes it clear that

THE COURT: What do you mean additional information? Not in the written submissions?

MS. SALLSTROM: That's correct, Your Honor.

THE COURT: Why am I getting things not briefed after I spent copious amounts of time studying 150 pages of

1 submissions?

2 MS. SALLSTROM: Your Honor, we --

3 THE COURT: Just the submissions.

4 MS. SALLSTROM: Yes, Your Honor. So in this  
5 particular instance, we certainly appreciate the time and  
6 effort that Court has put into reviewing the parties'  
7 submissions, which I know were extensive.

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 THE COURT: Have you shown it to your adversary?

13 MS. SALLSTROM: Yes, Your Honor. We advised them  
14 of this last week, sent a letter expressing that we intended  
15 to raise it with the Court today.

16 THE COURT: Okay.

17 Do you have a copy for the Court?

18 MS. SALLSTROM: Yes, I do, Your Honor.

19 THE COURT: Thanks, Lorraine.

20 Okay. Just for the record, I have before me a  
21 multiple-page document -- in fact, it's about half an inch  
22 thick -- which is Bates-stamped starting with Rosen 00455600  
23 and it goes -- looks like consecutively -- well, counsel will  
24 correct me if I am wrong -- it goes consecutively through  
25 Bates-stamped page Rosen 00455634, and then there is a

|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

40

1 one-page attachment entitled "Certificate of Accuracy" to  
2 certify that it's a true translation from Chinese into  
3 English.

4 Okay. Proceed. Thank you.

5 MS. SALLSTROM: Thank you, Your Honor.

6 So as Your Honor knows, Satimo Macro Generator is  
7 one of the CommScope trade secret software programs at issue  
8 in this case. It's been part of the case from the beginning,  
9 and since the beginning we've sought discovery into whether  
10 Rosenberger had and used it. They have denied for years that  
11 they had the program.

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 THE COURT: [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]



Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

41

1	[REDACTED]
2	[REDACTED]
3	[REDACTED]
4	[REDACTED]
5	[REDACTED]
6	[REDACTED]
7	[REDACTED]
8	[REDACTED]
9	[REDACTED]
10	[REDACTED]
11	[REDACTED]
12	[REDACTED]
13	[REDACTED]
14	[REDACTED]
15	[REDACTED]
16	[REDACTED]
17	[REDACTED]
18	[REDACTED]
19	[REDACTED]
20	[REDACTED]
21	[REDACTED]
22	[REDACTED]
23	[REDACTED]
24	[REDACTED]
25	[REDACTED]

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THE COURT: How so?

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MS. SALLSTROM: Yes. So as you've noticed, it's a  
certified translation. If you turn to the blue tab, that is  
the first page of the English portion of the document.

7

8

THE COURT: Okay. And the Bates number for the  
record is 455600.

9

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MS. SALLSTROM: And so on that page you'll see that  
I've highlighted some relevant language.

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So if you could please turn to the red tab.

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THE COURT: Okay.

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And for the record, that's Bates-stamped 455613.

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MS. SALLSTROM: In the middle of the page here,  
which I've highlighted for your convenience, there's the

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24  
25

[REDACTED]

THE COURT: Okay.

MS. SALLSTROM: And so if you'll flip through from  
the red tab to the yellow.

THE COURT: Let me interrupt you.

Is Rosenberger, based upon this document, still  
declining to produce what CommScope has requested,  
Mr. Filardo?

MS. SALLSTROM: Your Honor, we --

THE COURT: Just a minute.

MR. PELLEGRINO: Yes, Your Honor.

THE COURT: You're still declining to produce it?

MR. PELLEGRINO: Produce?

THE COURT: Produce what they requested about the

[REDACTED]

MR. PELLEGRINO: The request doesn't actually seek  
any documents. It asks for us to produce a witness [REDACTED]

[REDACTED]

THE COURT: Right. And you said there's no  
foundation [REDACTED], based upon your witness --  
your reinterpretation of his testimony.

MR. PELLEGRINO: Of the witness's testimony.

THE COURT: You're going to continue to resist  
this?

MR. FILARDO: To produce the witness? Yes,

1 Your Honor.

2 THE COURT: All right.

3 Go on.

4 MS. SALLSTROM: So I won't belabor the document,  
5 but if you'll flip through from the red tab to the yellow,  
6 you'll see that [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 THE COURT: Okay. You may be seated. Thank you.

13 MR. PELLEGRINO: Good afternoon, Your Honor. Nick  
14 Pellegrino from KWM on behalf of defendants.

15 As I just stated, what's been requested here is  
16 that defendants be ordered to produce a witness regarding

17 [REDACTED]

18 [REDACTED]. This has already been done. Defendants  
19 produced a 30(b)(6) witness to testify on this topic. He was  
20 deposed over four days for 26 hours of translated testimony.  
21 Plaintiffs could have asked all the questions that they  
22 wanted, but they decidedly chose not to. They waited until  
23 the very end of the deposition after 25 hours and 59 minutes  
24 to ask a single question on the topic.

25 Following that, Rosenberger produced a second

1 30(b)(6) witness a month and a half later. That witness was  
2 deposed for 14 hours. Plaintiffs still chose not to --

3 THE COURT: [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

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9 As I was saying, there were multiple witnesses that  
10 have been deposed on this topic -- that have been deposed on  
11 this topic. Plaintiffs decidedly chose not to ask any  
12 questions --

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Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

47

1	[REDACTED]
2	[REDACTED]
3	[REDACTED]
4	[REDACTED]
5	[REDACTED]
6	[REDACTED]
7	[REDACTED]
8	[REDACTED]
9	[REDACTED]
10	[REDACTED]
11	[REDACTED]
12	[REDACTED]
13	[REDACTED]
14	[REDACTED]
15	[REDACTED]
16	[REDACTED]
17	[REDACTED]
18	[REDACTED]
19	[REDACTED]
20	[REDACTED]
21	[REDACTED]
22	[REDACTED]
23	[REDACTED]
24	[REDACTED]
25	[REDACTED]

1 [REDACTED] --

2 THE COURT: I have the original.

3 Where's the errata? What does the errata say? Is  
4 it in the submissions?

5 MR. PELLEGRINO: The errata is not because it was  
6 submitted after the fact.

7 THE COURT: Okay.

8 MR. PELLEGRINO: After the submission.

9 THE COURT: Yeah, I understand. Please read it to  
10 me. What is the recast of the testimony?

11 MR. PELLEGRINO: Let me get the declaration. One  
12 moment, Your Honor.

13 THE COURT: Okay.

14 (Pause in proceedings)

15 THE COURT: Thank you.

16 Okay. I have the errata. I understand.

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]



Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

49

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]

9 Okay. I have it.

10 All right. Why don't you finish up?

11 MR. PELLEGRINO: Yeah, I'm just -- one second,  
12 Your Honor.

13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]

25 THE COURT: By Rosenberger.

Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

50

1 MR. PELLEGRINO: I'm sorry?

2 THE COURT: Produced by Rosenberger.

3 MR. PELLEGRINO: Yes, Your Honor.

4 THE COURT: Okay. Thank you.

5 MR. PELLEGRINO: Thank you.

6 (Pause in proceedings)

7 THE COURT: Go ahead, Ms. Sallstrom.

8 Just keep it brief.

9 MS. SALLSTROM: Yes, Your Honor.

10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

22 THE COURT: Okay.

23 MS. SALLSTROM: Thank you, Your Honor.

24 THE COURT: Thank you.

25 Okay. On the third issue, CommScope seeks

1 Rosenberg to be ordered to produce a [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 This software program is mentioned specifically in  
6 at least the amended complaint, probably the original  
7 version, and has been the subject of discovery since  
8 discovery's commencement years ago. [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED] And

18 that's from Exhibit F at 497.

19 Rosenberg does not dispute that the information  
20 is relevant. It does argue that further discovery would be  
21 disproportional given how much discovery CommScope has taken  
22 in general.

23 But the Court does not agree as this is a discrete  
24 issue that only arose at the recent deposition.

25 Rosenberg's main opposition to CommScope's application is

Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

52

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

1 In any event, there is at minimum an ambiguity on a  
2 relevant issue that needs to be cleared up, and CommScope may  
3 do so at a further deposition.

4 All right. One further thing, and then we're going  
5 to take a short break. On Issue 4 [REDACTED]  
6 [REDACTED], Rosenberger was not objecting to  
7 producing what exists. Therefore, I did not spend time  
8 preparing on this issue. It looked like it was in the middle  
9 of a meet-and-confer. I prepared plenty on everything else.  
10 But I don't do it on things that "may" be in dispute.

11 So if this landed as a definite dispute, you're  
12 going to have to submit it with where it landed. I am not  
13 going to hear that.

14 You can give me an update, if you like.

15 MALE SPEAKER: Who would you like to go first,  
16 Your Honor?

17 THE COURT: Go ahead, Mr. Washburn.

18 MR. WASHBURN: Thank you, Your Honor. Just  
19 briefly, and, again, we appreciate the Court's time.

20 Again, this is Bryan Washburn on behalf of  
21 CommScope.

22 To give the Court an update on where we are, we  
23 learned for the first time in 30(b)(6) testimony in Hong  
24 Kong, [REDACTED]  
25 [REDACTED]. That information should have

1 | been produced before depositions. We're now four months  
2 | removed from that deposition testimony. We obtained on  
3 | Friday the first production, and much of the information that  
4 | their 30(b)(6) identified as existing was not produced.

5 |           We asked where it was. All defendants could tell  
6 | us is they're still conferring with their client.

7 |           We think an order directing them to produce the  
8 | documents related to RFP 111 would -- is necessary, given the  
9 | amount of time that's passed since the deposition testimony  
10 | and the information's still not produced.

11 |           THE COURT: All right. But there's not a dispute  
12 | as to relevance. I agree that there should be a commitment  
13 | because we're on -- we're long past fact discovery.

14 |           But why don't you continue that? If you're not  
15 | satisfied with their commitments to a date certain, then you  
16 | can come back to me.

17 |           MR. WASHBURN: Fair enough. Thank you, Your Honor.

18 |           THE COURT: Okay.

19 |           Is there anything Rosenberger wishes to say on  
20 | that?

21 |           ATTORNEY FOR DEFENDANTS: Are you asking that we  
22 | meet and confer with them afterwards to come up with a date  
23 | certain?

24 |           THE COURT: Whatever they're seeking. There should  
25 | be certainty. If you're going to produce it, they should

|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

55

1 know when the end date is. They're trying to plan -- there's  
2 going to be some re-depositions, and they probably want to  
3 know before that.

4 ATTORNEY FOR DEFENDANTS: Yeah, absolutely,  
5 Your Honor. We've already produced, I think, over 150 to 200  
6 documents [REDACTED]

7 [REDACTED]  
8 [REDACTED] --

9 THE COURT: Okay. I don't need the details.

10 ATTORNEY FOR DEFENDANTS: Understood, Your Honor.

11 THE COURT: Conclude it.

12 ATTORNEY FOR DEFENDANTS: Happy to confer with them  
13 on a date certain.

14 THE COURT: All right. Let's take a 5-minute  
15 break. Thank you.

16 (Recess)

17 THE COURT OFFICER: You're back on the record,  
18 Judge.

19 THE COURT: All right. We are continuing with the  
20 CommScope hearing, and we are up to Issue 5, which is  
21 something that Rosenberger is seeking; so they should go  
22 first, please.

23 MR. SKLAR: Thank you, Your Honor. I apologize for  
24 the lack of jacket. I thought that it was in the car and  
25 didn't want to be late to your hearing.

1 THE COURT: Not a problem.

2 MR. SKLAR: So this discovery request goes to the  
3 heart of the dispute; namely, whether CommScope took adequate  
4 protections to keep its confidential information and trade  
5 secrets protected; whether their business has been adversely  
6 impacted; whether their customer relationships have been  
7 affected; whether competitors now have access to all of their  
8 alleged confidential information trade secrets; what remedial  
9 measures have been taken --

10 THE COURT: Where is the information posted?

11 MR. SKLAR: It's been posted on the dark web.

12 THE COURT: Okay. But not on the internet?

13 MR. SKLAR: No. Oh, well, the dark web is a part  
14 of the internet, but it is on the dark web --

15 THE COURT: The noncriminal internet.

16 MR. SKLAR: It's -- correct. It's on the dark web.

17 THE COURT: Okay.

18 MR. SKLAR: But so far we've been stopped from  
19 getting any discovery on this.

20 THE COURT: And do you know whether any of it  
21 concerns BSAs?

22 MR. SKLAR: Yes, our understanding is that it does  
23 concern BSAs.

24 THE COURT: How do you know that?

25 MR. SKLAR: Well, I think that extent of our



1 investigation is privileged.

2 What I can say is that we did open the first page  
3 of it. On the first page, there was a folder called BSA.

4 THE COURT: Okay.

5 MR. SKLAR: While CommScope has tried to stop  
6 discovery on the data breach at every turn, we do know that  
7 their data was breached, data was taken; [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED] CommScope's information has been on the dark  
11 web since at least April.

12 We know that reporters have accessed the data.

13 [REDACTED] -- My CommScope  
14 customer portal and internal internet were accessed, as well  
15 as internal documents, invoices and technical drawings.

16 When we requested CommScope -- when we questioned  
17 CommScope on this, they did not provide us any information.

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 They have not updated their interrogatories.  
22 They've not produced any documents. They refuse to prepare a  
23 30(b)(6) witness --

24 THE COURT: Let me ask you something.

25 MR. SKLAR: Yes.

1 THE COURT: So your primary contention of relevance  
2 is that the hack would demonstrate that they didn't  
3 sufficiently protect their internal information such that it  
4 could qualify as a trade secret?

5 MR. SKLAR: Yes, that and then also we believe that  
6 it's been open to the public and that would -- any trade  
7 secret status that it had.

8 THE COURT: Okay. And open to the public meaning,  
9 it's been on the dark web?

10 MR. SKLAR: Yes. But --

11 THE COURT: Okay.

12 MR. SKLAR: -- by being on the dark web, anyone  
13 with internet access can access it through Tor, which --

14 THE COURT: Well, you have to download Tor; right?

15 MR. SKLAR: Sure. Yeah, but it is a free browser  
16 similar to Google Chrome or Microsoft Edge.

17 CommScope did agree to produce the [REDACTED]  
18 [REDACTED] They have since told us that  
19 they will not produce the [REDACTED]

20 [REDACTED]

21 They also told us they were investigating what  
22 relevant information was reached in the data breach.

23 They've also told us that they refuse to provide  
24 whatever information that is.

25 We believe it's relevant --

1 THE COURT: Now, one thing cited in your arguments  
2 on this -- and you quoted -- I think it was the New Jersey  
3 Defend Trade Secrets Act. You said that -- oh, let me get  
4 the exact quote.

5 MR. SKLAR: I believe we cited on page 40 --

6 THE COURT: Let me finish my thought, please.

7 MR. SKLAR: My apologies.

8 THE COURT: Okay.

9 In Rosenberger's portion of the joint letter at ECF  
10 566, pages 42 to 43, citing the New Jersey Trade Secrets Act,  
11 56:15-2, Rosenberger pointed out that a trade secret may lose  
12 such protection when its value derives in part from not being  
13 generally known to and not being readily ascertainable by  
14 proper means by other persons.

15 Do you contend that the hack was obtained --  
16 constitutes obtaining the information from CommScope by  
17 proper means?

18 MR. SKLAR: No, I don't think that the hack itself  
19 obtained anything by proper means. But I do think that it's  
20 open on the internet that anyone can access. And that --

21 THE COURT: And it was made available by a criminal  
22 act.

23 MR. SKLAR: That is true, but we also cited case  
24 law that says however it became made available, once it's on  
25 the internet and now it does become public.

1 THE COURT: Okay.

2 MR. SKLAR: Further, we do believe that has gone to  
3 damages because [REDACTED]

4 [REDACTED] We know that CommScope's My  
5 CommScope portal was opened and accessed and breached. Their  
6 internet was breached. Invoices, technical drawings were put  
7 onto the dark web.

8 We have cited secondary --

9 THE COURT: That's a lot of information from the  
10 first page.

11 MR. SKLAR: No, it says that in the articles that  
12 we cited.

13 THE COURT: Oh.

14 MR. SKLAR: Yeah. -- yeah, and I brought those  
15 articles with me. Multiple different reporters have said  
16 that. It's in multiple articles that we have given to you.

17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

22 They've said that pretty much all of their damages  
23 are now related -- all their damages -- all their business  
24 troubles in the BSA industry is because of our clients. And  
25 this would show that it's not, that there are other factors.

1 And it's important for our experts to see this. It's  
2 important for our experts to see the [REDACTED], to see  
3 how these hackers actually got into the system, whether --  
4 our security experts told us that's actually very important  
5 for them to see.

6 And we've also provided articles which show that  
7 the data breach affected CommScope's EBITDA by almost \$2  
8 million last year. And we're not sure how much it affected  
9 it so far.

10 While they have said that the information is  
11 privileged, they refuse to identify the company -- [REDACTED]

12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 And at the end -- we have offered to review the  
20 data. We have been threatened with ethical and criminal  
21 allegations against us if we were to review the data. We  
22 think that the information is public since anyone can access  
23 it. There is no argument that the data would be purloined if  
24 we did that. [REDACTED]

25 [REDACTED]

1 [REDACTED] The burden is too high.

2 [REDACTED]

3 [REDACTED]

4 [REDACTED] And we need to know that for our  
5 defenses.

6 THE COURT: Okay. I understand.

7 MR. SKLAR: Thank you.

8 MR. KAHNKE: So, Your Honor, I know you're well  
9 familiar.

10 THE COURT: Mr. Kahnke, I know who you are, but  
11 just state it for the record.

12 MR. KAHNKE: Thank you, Your Honor. I'm Randy  
13 Kahnke from Faegre Drinker on behalf of CommScope.

14 You know from your years of involvement with this  
15 case, that we now have compelling evidence that Rosenberger  
16 has our trade secrets, both hardware and software, and we  
17 have more evidence that they've used them. That's what we  
18 know in this case. That's the context.

19 And now, against all of that, we have Rosenberger  
20 saying, "Okay. We're going to try to look at this other  
21 issue, where you were subject to a criminal hack by a Russian  
22 criminal enterprise. And we are going to try to use that to  
23 somehow undermine what's been done in this case." That's  
24 what's going on. I would suggest to you that it is a classic  
25 "blame the victim" situation.

1                   These hacks happen all the time. Just last week,  
2 "The Times" reported --

3                   THE COURT: Microsoft.

4                   MR. KAHNKE: Bingo. The largest company in the  
5 world by market cap, one of the most sophisticated companies  
6 in this industry, the electronics service industry, their  
7 senior executives' emails attacked. And who did it? The  
8 Russians did it. Right?

9                   So what is this -- what is this relevant to?

10                   [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13                   [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19                   [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

1 THE COURT: You waived privilege by producing it to  
2 the adversary.

3 MR. KAHNKE: Correct. You waive privilege with  
4 respect to that piece. It's not a subject matter --

5 THE COURT: The four corners of what was produced.

6 MR. KAHNKE: You know that.

7 They say beyond that, that this information is  
8 somehow relevant, that this breach is somehow relevant to  
9 what's going on in this case. It's legally irrelevant. You  
10 put your finger on it: With proper means.

11 If -- they want to say that the information is in  
12 the public domain -- it's not. It is not on the public  
13 internet. It is on the dark web. It is the playground of  
14 criminals. That is what the FBI recognizes. That's what the  
15 United States cybersecurity says. Don't go there.

16 Everybody knows that that information is what it  
17 is. It's criminal information. It's called the "dark web"  
18 for a good reason.

19 It is not there as a result of proper means. And  
20 if it's not there as a result of proper means, it does not  
21 erode the trade secret protection. It's not the public  
22 internet.

23 It also -- and Your Honor will know this -- it also  
24 is not relevant to their claims in this case about how the  
25 information was misappropriated, our claims about how the



1 information was misappropriated. In order for this  
2 information to be relevant, there has to be a correspondence,  
3 a relationship between the manner in which this information  
4 was, even by their account, made public -- okay? -- a data  
5 breach and the misappropriation. We have no correspondence  
6 or relationship between those two. There's a data breach.  
7 And that has nothing to do -- see, the first issue that  
8 you've already talked about here today in your ruling. We  
9 have former employees who took this information and took it  
10 over to Rosenberger where they used it. It has nothing to do  
11 with the data breach. That happened years ago. The data  
12 breach just happened last March. There's no correspondence  
13 there. And the law is clear that if there's no  
14 correspondence, there's no relevance.

15           Beyond that, they say it's relevant to reasonable  
16 efforts. They have had extensive discovery over the course  
17 of years and over the course of many hours and many witnesses  
18 of deposition testimony about the efforts that CommScope  
19 takes to protect the confidentiality of its trade secrets.  
20 They have that information. They already know that  
21 information. They know what has -- what CommScope does.  
22 They're going to make the arguments that they will make about  
23 that.

24           They cannot cite a single case -- and I just want  
25 to be real clear about what the cases are that have been

1 cited here. They have not cited -- I don't believe they can  
2 cite a single case that says what happens in some satellite  
3 data breach litigation or data breach situation is relevant  
4 to what's going on in this case regarding trade secrecy.  
5 There's not a single case that they cite on it. And I don't  
6 believe that there's a single case available.

7 And I think it makes good sense that there are no  
8 cases because these breaches are ubiquitous, as Your Honor  
9 knows. And if we go down that path where we're saying that a  
10 data breach is somehow relevant to a trade secret case, we  
11 are going to have a case within a case -- every time you've  
12 got a trade secret case and you've got a data breach, you're  
13 going to have a case within a case.

14 In this case, [REDACTED]

15 [REDACTED]  
16 [REDACTED] Not a single case that they can cite that  
17 says that, that it's relevant. And I think for good reason.

18 Similarly, not a single case that they can cite  
19 that says if you put information on the dark web, not the  
20 public internet where you can get it with a Google search,  
21 but on the criminal playground, if you put information there  
22 when the information is obtained by improper means -- and,  
23 man, if there's anything that's improper means, a criminal  
24 hack certainly is -- there's not a single case they can cite  
25 that says that's relevant to the erosion of trade secrecy.

1 Not one.

2 That leaves us to their, I guess, final proposal,  
3 which is that counsel themselves should be allowed to review  
4 this information. I'm respectful of the questions Your Honor  
5 asked of counsel because you, at least, got a bit of an  
6 answer. We got nothing.

7 We're very concerned about it. We're very  
8 concerned about what's happened here. You understand the  
9 ethical rules. We know that. They've asked for permission  
10 to review this information. And I think that's very telling.

11 If this information was available on the internet,  
12 available through a Google search, there would be no request.  
13 They're aware of that. It's an inappropriate thing to do,  
14 and the ethics rules are clear on it.

15 I'll stop there unless Your Honor has questions.

16 THE COURT: I don't. Thank you.

17 MR. KAHNKE: Thank you.

18 THE COURT: Okay.

19 On this issue, which I've labeled Issue 5 -- did  
20 you want to say something else?

21 MR. SKLAR: Yeah, I just had, like, two or three  
22 quick --

23 THE COURT: Sure. Come on up.

24 MR. SKLAR: Thank you very much.

25 THE COURT: And just for the reporter, say your

1 name again when you come to the podium.

2 MR. SKLAR: Thank you. Andrew Sklar from King Wood  
3 Mallesons on behalf of defendants.

4 THE COURT: Oh, he's not the court reporter. The  
5 court reporter is the recording.

6 MR. SKLAR: Understood. Thank you.

7 THE COURT: That's my law clerk.

8 MR. SKLAR: Sorry.

9 So, first, when he was talking about privilege, I  
10 just want to point out that under Federal  
11 Rule 26(b)(3)(A)(2), if the information is not accessible  
12 through any other means, then the work product privilege  
13 would not apply.

14 And for just standard privileges to apply, then it  
15 would have had to have been made primary -- for the primary  
16 purpose of litigation.

17 There are news -- they have put out statements in  
18 news articles saying that this was made to see what data was  
19 leaked, to do a full investigation on it. They have never  
20 mentioned any litigation. First time was to us. We didn't  
21 know who the attorneys were for that. [REDACTED]

22 [REDACTED]  
23 [REDACTED]

24 In all the cases they cited, there was a two-tier  
25 investigation. So there was one investigation for the legal

1 team. There was another investigation showing for -- for the  
2 company itself. And in those cases, the legal team's  
3 investigation was privileged, but the rest of the information  
4 and the rest of the investigation was not privileged.

5 Second, I know he said that we asked for  
6 permission. We did not -- for permission. We asked if they  
7 objected to it because they hinted that they would do  
8 something. And because they threatened us with ethical and  
9 criminal sanctions with this, we, obviously, wanted to go to  
10 the Court first.

11 Next, he kept pointing out that we pointed out no  
12 cases for a data breach. And what we have pointed out are  
13 multiple cases where information could be posted online, had  
14 been posted in news groups and posted in groups online, small  
15 areas of the internet with less than the millions of people  
16 who view the information on the dark web. I don't think it  
17 matters if it was from a data breach or if it was from the  
18 dark web. He was saying we have no cases that say that this  
19 is a leak. There are no cases going the other way either.  
20 This is a novel issue.

21 THE COURT: Wrap it up.

22 MR. SKLAR: Yeah, I'm sorry.

23 Lastly, I just want to point out that CommScope's  
24 own website does point out that a business will lose its  
25 reputation. We cited that in our papers. And that could

1 take years to come back. And so I think that supports our  
2 damages arguments.

3 And I also would just, at the very least, like a  
4 commitment for them to produce the executive summary because  
5 they did tell us they would be producing that. They agreed  
6 to it. They said in their papers.

7 THE COURT: They offered it to you. You declined;  
8 right?

9 MR. SKLAR: Thank you.

10 THE COURT: Have a seat. Rosenberger seeks  
11 information on a data breach of CommScope perpetrated by  
12 criminal hackers from Russia. Apparently, the hackers posted  
13 information they obtained on the dark web.

14 The Court finds Rosenberger's request is neither  
15 sufficiently relevant nor proportional to this action to  
16 order the requested discovery. In briefing this issue, the  
17 parties seem to have lost sight of the forest for the trees.  
18 The forest, as this Court sees it, is as follows.

19 CommScope was the victim of a crime committed by  
20 hackers, seemingly very sophisticated ones and possibly  
21 state-sponsored actors. CommScope is not alone. Legions of  
22 parties who responsibly protect their confidential  
23 information -- hospitals, police stations, even the federal  
24 courts through the SolarWinds breach, and last week even  
25 Microsoft -- have similarly been victims of criminal hacking.

1           Therefore, the Court does not start with the  
2 presumption, as Rosenberger urges, that CommScope, having  
3 been victim of a data breach, necessarily failed to take  
4 adequate security measures to qualify its proprietary  
5 information in BSAs as trade secrets.

6           The question before the Court is whether the recent  
7 hack of CommScope is relevant to whether CommScope  
8 sufficiently protected its internal information for it to  
9 qualify for trade secret protection.

10           A trade secret is entitled to legal protection when  
11 its owners have taken reasonable measures to maintain its  
12 secrecy. See Oakwood Laboratories LLC v. Thanoo, 999 F.3d  
13 892 at page 905, a Third Circuit decision from 2021.

14           However, it may lose such protection, as  
15 Rosenberger points out, when its value derives in part "from  
16 not being generally known to and not readily ascertainable by  
17 proper means by, other persons who can obtain economic value  
18 from its disclosure or use." See Rosenberger's portion of  
19 the Joint Letter at 566, pages 42 to 43, citing New Jersey  
20 Trade Secret Act 56:15-2.

21           There is no question that "proper means" were not  
22 used to ascertain CommScope's information by the criminal  
23 hackers. Proper means do not include criminal acts.  
24 Therefore, the fact that CommScope was the victim of a  
25 criminal hack is not relevant to the issues of whether

1 CommScope's design files are entitled to trade secret status  
2 under New Jersey law. Compare Hurry Family Revocable Trust  
3 v. Frankel, 2023 WL 23805 at \*8, a Middle District of Florida  
4 decision from January 3, 2023, which parenthetically states  
5 "intentional publication of material will destroy its trade  
6 secret status." See also Merckle GmbH v. Johnson & Johnson,  
7 961 F. Supp. 721 at page 731, a District of New Jersey  
8 decision from 1997. And, parenthetically, that case states,  
9 "A substantial element of secrecy must exist so that, except  
10 by the use of improper means, there would be difficulty in  
11 acquiring the information." And that's further quoting the  
12 Restatement of Torts.

13           Moreover, the fact that portions of CommScope's  
14 information allegedly have now been made public through  
15 criminal activity does not waive its right wholesale to trade  
16 secret protection, as Rosenberger argues. And  
17 parenthetically, I will say that I do not consider  
18 publication on the dark web as being made public, given the  
19 additional and warned-against steps needed to access the dark  
20 web.

21           In any event, inadvertent revelations of  
22 confidential information does not waive its protected status.  
23 Instead, the information loses its protection only if it is  
24 made "generally known to the relevant people, typically  
25 meaning competitors." Syncsort Inc. v. Innovative Routines,



1 2011 WL 3651331 at \*14, a District of New Jersey decision  
2 from August 18, 2011.

3           Rosenberger has not introduced sufficient evidence  
4 that the evidence posted on the dark web has become "widely  
5 available" information as to obviate trade secret protection  
6 or evidence that "competitors or unauthorized persons  
7 accessed or even attempted to access the information," such  
8 as to deprive the information of its economic value. See id.  
9 at \*15.

10           Therefore, the Court finds the 2023 data breach is  
11 not sufficiently relevant to the issues present in this case.

12           Furthermore, the time period of the hack, in March  
13 of 2023, also underscores its lack of relevance to this case.  
14 Whatever security procedures were in place in 2023 at the  
15 time of the recent data breach may well have been quite  
16 different from those in place prior to 2019, which is the  
17 time period at issue in this action.

18           Nor is the information sought by Rosenberger here  
19 proportional, even if it had some tangential relevance,  
20 assuming *arguendo*. Rosenberger seeks broad discovery into  
21 the hack. But Rosenberger has had years to discover  
22 CommScope's means of protecting its alleged trade secrets, a  
23 key and obvious element in determining whether or not a trade  
24 secret exists. See Merckle GmbH v. Johnson & Johnson, 961 F.  
25 Supp. 721 at page 731, a District of New Jersey decision from

1 1997.

2 Accordingly, the relevant information as to what  
3 steps CommScope took to protect its trade secrets has been  
4 discoverable since the commencement of discovery in this  
5 long-pending litigation. It cannot reasonably be considered  
6 to have emerged only after CommScope was hacked in 2023.

7 This, again, suggests that Rosenberger's request is  
8 not proportional. Rosenberger's request for this Court to  
9 compel any information concerning the criminal hack of  
10 CommScope is denied.

11 Issue 6.

12 Your name again, sir?

13 MR. MILLER: Dan Miller, from King Wood & Mallesons  
14 on behalf of defendants.

15 So this is a -- it's a simple issue, and it's a  
16 small issue. I think it's a really discrete issue.

17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

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[REDACTED]

THE COURT: Do you dispute that copies of the deleted old version of AAAP were retained in CommScope's central repository?

MR. MILLER: We have been provided no evidence that anything was retained. We have been provided no log of where any such deletions occurred.

THE COURT: Okay. They indicated that they produced the information from the central repository to Rosenberger several years ago.

MR. MILLER: I think they produced the source code. But what they didn't produce was the result of the deletions.

THE COURT: What do you mean by the "result of the deletions"?

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

76

1 [REDACTED]  
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6 [REDACTED]  
7 THE COURT: Can I just back up a little bit.  
8 MR. MILLER: Yes, Your Honor.  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
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Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

77

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Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

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Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

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Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

80

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Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

81

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24 [REDACTED]  
25 THE COURT: What does that mean?

|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

82

1 MR. MILLER: It's like a --

2 THE COURT: It helps you design --

3 MR. MILLER: No. It's a software module; right?

4 THE COURT: Okay.

5 MR. MILLER: You can take this -- you can take this  
6 executable, I could email someone, they can run it. You  
7 could put it anywhere. This thing could exist --

8 THE COURT: Okay.

9 MR. MILLER: Right? It's not the -- it's not the  
10 source code itself. It's the executable version. It's  
11 the -- like, Word; right?

12 THE COURT: Okay.

13 MR. MILLER: Right? And you send a copy of Word,  
14 and somebody now is running Word over there. You know, it's  
15 a little more complicated, but it's the same thing.

16 THE COURT: Okay. I understand.

17 [REDACTED]  
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19 [REDACTED]  
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Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

83

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15 [REDACTED]  
16 [REDACTED]  
17 THE COURT: Mm-hmm.  
18 [REDACTED]  
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|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

84

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10 [REDACTED]  
11 THE COURT: Okay.  
12 If you would sit down for a minute. I want to hear  
13 from -- I'll have you back up again.  
14 MR. MILLER: All right.  
15 THE COURT: But I want to hear what CommScope says.  
16 I'm struggling to understand all this.  
17 MS. SALLSTROM: Thank you, Your Honor. This is  
18 Anna Sallstrom of Faegre Drinker for CommScope.  
19 And I can simplify this.  
20 THE COURT: Good.  
21 MS. SALLSTROM: In short, Your Honor's  
22 understanding of Mr. Patel's testimony at his recent full  
23 merits deposition is correct. [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

85

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|Hearing  
|19-cv-15962, January 25, 2024  
|SEALED (available for parties; NOT available for the public)

86

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19 [REDACTED]  
20 [REDACTED]  
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22 [REDACTED]  
23 [REDACTED]  
24 THE COURT: Yeah.  
25 [REDACTED]

Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

87

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THE COURT: Okay.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

THE COURT: Okay. What about who had access to the previous version? If they have the previous version, both source code and executables, then I guess the next question is what about Mr. Miller's desire to know who had access to it within CommScope?

MS. SALLSTROM: So Rosenberger already has conducted significant discovery on that topic. They've asked witnesses who had access to AAAP. There's been, as you've heard, extensive discovery already on reasonable-efforts related issues like that one. The script is very, very far from their only source of information on that topic.

[REDACTED]

[REDACTED]



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THE COURT: What's the harm of producing the script?

MS. SALLSTROM: Right.

So the first point is really a practical one. This is far too late; right? So one harm to CommScope is simply that we know that counsel for Rosenberger --

THE COURT: This whole case is far too late.

But what's the prejudice?

MS. SALLSTROM: So there's a lot of water under the bridge; right? This case has been going for a long time. Depositions were conducted on this topic in January 2020. They knew about the script then. We briefed these issues in our PI motion -- right? -- and CommScope's motion for a preliminary injunction. They never asked for it.

Rosenberger's prior counsel, Milbank had every opportunity to send us -- to submit a discovery request -- right? -- in full merits discovery asking for the script, which we know they knew about. And they didn't.

Instead, they made a strategic decision to rely on the extensive other information available to them on these topics -- much of which -- on this topic, much of which I've

1 just run through.

2 And at this point we're -- in fact, counsel for  
3 Rosenberger didn't reraise the PowerShell script with us  
4 until Mr. Patel's deposition, which took place six months  
5 after the close of written discovery. And there, as we've  
6 discussed, they learned nothing new. There's just simply no  
7 good cause here.

8 And that's our primary argument.

9 THE COURT: Okay. Thank you.

10 MS. SALLSTROM: Thank you, Your Honor.

11 THE COURT: All right.

12 I really want to resolve -- oh, go ahead. Go on.

13 Yeah.

14 MR. MILLER: Just a couple of --

15 THE COURT: I promised you and ...

16 MR. MILLER: You did. I feel like ...

17 All right. Dan Miller again, KWM.

18 I think what's telling, what you didn't hear is  
19 CommScope never said it's not relevant. And it is relevant  
20 because it goes to key points of how it was kept and  
21 maintained. They said we could have asked for it. I would  
22 say that they always had a duty to produce it and disclose  
23 it.

24 THE COURT: But Rosenberger [verbatim], clearly the  
25 record shows that the PowerShell script was mentioned years

1 ago.

2 MR. MILLER: Sure, it was known.

3 THE COURT: And if it was, why didn't you waive the  
4 right to seek it and -- well --

5 MR. MILLER: Because --

6 THE COURT: -- while discovery was open?

7 MR. MILLER: Because the testimony was consistent.

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 They haven't said it's onerous.

21 THE COURT: And there's no spoliation because it  
22 didn't disappear. It has to be irretrievably lost or  
23 altered. So to the extent there are shades of spoliation  
24 here, it's not -- that dog won't hunt.

25 MR. MILLER: Well, if -- we would know from the

1 PowerShell script -- also they -- [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 THE COURT: But you don't dispute that you have not  
5 only the source code but executables for the previous version  
6 of AAAP.

7 MR. MILLER: But that doesn't tell me --

8 THE COURT: Do you dispute that?

9 MR. MILLER: I do not.

10 But that doesn't tell me where it was.

11 THE COURT: Okay. So that's the one piece that's  
12 missing.

13 But I thought that's what you also said the  
14 PowerShell script won't tell you.

15 MR. MILLER: It will tell me where they looked for  
16 deletions. It will also tell me whether they created a log  
17 file at the time. I don't know if they created a log file of  
18 deletions. If they did, they haven't produced it. And the  
19 PowerShell --

20 THE COURT: That's not --

21 (Simultaneous conversation)

22 MR. MILLER: -- if the PowerShell script says that  
23 they did because you would pipe it to a file if you --

24 THE COURT: I see.

25 MR. MILLER: -- get the list.

1 I don't know. They haven't produced it. And you  
2 don't -- what they can't do is cherry-pick the evidence.  
3 They can't now just want to rely on Mr. Patel's deposition  
4 testimony when we could determine whether that's true or not  
5 based simply on this one file.

6 THE COURT: Okay. This is what I'd like to do.  
7 You know I am not a punter; right? I may adjourn hearings,  
8 but when I get to them, I want to settle all family business  
9 and be done with it.

10 But this is one issue -- I really didn't grasp it  
11 in the briefing. I didn't get from Rosenberger's arguments  
12 what was relevant. I understand better now at oral argument.

13 But I want you to make one more effort to resolve  
14 it. And, if not, then one short submission, joint  
15 submission, and drill down on what Rosenberger is seeking  
16 here that it contends is relevant and that hasn't been  
17 answered by the previous productions or discovery. Okay?

18 MR. MILLER: Yes, Your Honor.

19 THE COURT: And then why what you seek you believe  
20 will show that; you can't know but why you have grounds to  
21 believe that. And then let CommScope see it. And I'll -- I  
22 promise I won't delay you long in deciding it. So I'll  
23 reserve on this issue. Thank you.

24 MR. MILLER: Thank you, Your Honor.

25 THE COURT: Okay. All right.

1           Let's go -- I think we're on the final issue.  
2 Issue 7 concerning the deposition of Mr. Bisiules, if I'm  
3 pronouncing that correctly.

4           MR. FILARDO: Yes, good afternoon, Your Honor.  
5 Vincent Filardo again.

6           This is a -- sort of a related issue because it  
7 arose out of the same set of facts. And I want to refer the  
8 Court to Exhibit JJ, which is the relevant portions of the  
9 transcript of Mr. Bisiules's disposition.

10          THE COURT: Yeah, I read it.

11          MR. FILARDO: [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED] -

15          THE COURT: Enabled people to misappropriate their  
16 stuff.

17          MR. FILARDO: Yeah, exactly. They were able to  
18 now --

19          THE COURT: It's not that nefarious.

20          MR. FILARDO: [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

Hearing  
19-cv-15962, January 25, 2024  
SEALED (available for parties; NOT available for the public)

95

1 a [REDACTED]  
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5 [REDACTED]  
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7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 THE COURT: Right.  
12 MR. FILARDO: [REDACTED]  
13 [REDACTED].  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 THE COURT: Right.  
18 MR. FILARDO: -- [REDACTED]  
19 He refused to answer that. [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

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THE COURT: Okay. Go back to the deposition.

10

MR. FILARDO: So that's --

11

THE COURT: What was wrong in invoking privilege?

12

MR. FILARDO: So, in essence, I think -- you know,

13

I don't think that it was protected by privilege for him to

14

refuse to answer a question about whether he made an effort

15

to preserve documents, whether he searched for documents on

16

his work -- or whether he searched for documents on his home

17

computers or files. I don't think any of that was

18

privileged.

19

He believed it was because his counsel said, "I

20

want to caution you that if we discussed this, you know, then

21

don't waive the privilege."

22

THE COURT: Okay.

23

MR. FILARDO: Counsel directed him not to answer,

24

but you saw the result.

25

THE COURT: I understand.



1 MR. FILARDO: And that's it. That's the point that  
2 I wanted to make, and I think that's what the deposition  
3 transcript shows.

4 THE COURT: Thank you.

5 MS. MAPPES: Thank you, Your Honor. Harmony  
6 Mappes, again for CommScope. I will be quick. I have three  
7 points.

8 THE COURT: Okay.

9 MS. MAPPES: Number one, counsel followed a very  
10 standard practice in giving a cautionary note not to reveal  
11 privileged information.

12 THE COURT: Right.

13 MS. MAPPES: Not only is it standard, Rosenberger  
14 gave this exact same guidance to many of its witnesses  
15 throughout those depositions.

16 Point number two, counsel did not instruct  
17 Mr. Bisiules not to answer the questions. Mr. Bisiules  
18 answered the questions to the best of his ability, including  
19 specifically saying he did not destroy any documents.

20 Point number three, on these facts, Rosenberger has  
21 not established good cause to reopen the deposition or to  
22 compel a declaration. If good cause exists to reopen here  
23 based on that sort of cautionary instruction, then good cause  
24 would exist practical in all cases, including other  
25 depositions in this case. Instead of --

1 THE COURT: I was going to ask counsel why they  
2 didn't call me from the deposition. I don't think it was in  
3 Hong Kong. He's a U.S.-side witness. Right?

4 MS. MAPPES: It was a U.S.-side witness,  
5 Your Honor, and instead of trying to work out is there some  
6 discrepancy here about what the witness is understanding, the  
7 deposition was adjourned, and there was no further effort  
8 made or no further questions asked to try to sort this out.  
9 Mr. Bisiules was not instructed not to answer the question.  
10 There's no -- I mean, counsel's argument relies on  
11 spoliation. There's no evidence of that here, and they have  
12 not met the good cause standard to reopen the deposition.

13 THE COURT: Okay.

14 MS. MAPPES: Thank you, Your Honor.

15 THE COURT: I don't think you need to say anything.

16 All right. In the final issue presented by the  
17 parties, Rosenberger seeks a declaration or additional  
18 deposition testimony from CommScope's director of BSA  
19 engineering, Pete Bisiules, on the ground that he improperly  
20 refused to answer certain questions at deposition.

21 The Court has reviewed the deposition transcript at  
22 issue. There were only a few questions the witness refused  
23 to answer on privilege grounds without an instruction from  
24 his attorney not to answer the question.

25 What should have happened is the witness should

1 have conferred with his counsel about whether the information  
2 sought was privileged -- it's one of the few exceptions that  
3 you can confer when sworn with your counsel privately -- and  
4 the attorney should have given the witness an instruction  
5 about whether he could answer the question or not or parts of  
6 it and made a record of the private conference and its  
7 outcome. See Hall v. Clifton Precision, 150 F.R.D. 525 at  
8 529 to 530, an Eastern District of Pennsylvania decision from  
9 1993.

10 But instead, it seems the layperson witness  
11 struggled to decide himself whether the information sought  
12 was privileged.

13 The Court will make rulings now on the only  
14 questions the witness declined to answer in the deposition  
15 excerpt provided to the Court.

16 First, Mr. Bisiules self-invoked privilege in  
17 declining to answer whether he and others at CommScope "made  
18 a concerted effort to preserve documents and records as a  
19 result of this litigation." And that's from Exhibit JJ at  
20 pages 240 to 241.

21 There was a form and foundation objection and a  
22 direction not to reveal the content of discussions with  
23 counsel.

24 And then the witness said he could not answer the  
25 question.

1           The Court finds he ought to have answered the  
2 question about whether he personally made efforts to preserve  
3 documents and records. But there was no foundation to  
4 establish whether he was familiar with what others at  
5 CommScope did, and he testified in 30(b)(1) and not a  
6 30(b)(6) capacity, so he need not have answered that portion  
7 of the question about what others did.

8           But there is no privilege as to whether he  
9 preserved documents and records because it simply involves  
10 his testifying as to his own actions and matters within his  
11 personal knowledge and, as it was phrased, it would not call  
12 for revealing what legal counsel may have advised him.

13           Second, Mr. Bisiules was asked whether he received  
14 a litigation hold letters instructing him to preserve  
15 documents, and he declined to answer on the grounds of  
16 privilege. Both CommScope and Rosenberger cite authority  
17 agreeing with Mr. Bisiules's conclusion that a litigation  
18 hold letter is privileged. See ECF 566 at pages 77 and 79,  
19 absent spoliation, which was not alleged or shown by  
20 Rosenberger.

21           So he properly declined to answer about the  
22 litigation hold letter, though his counsel should have  
23 instructed him not to do so.

24           Finally, there were several additional questions  
25 about whether the witness searched his work files and

1 personal devices for relevant information as part of this  
2 litigation. See Exhibit JJ at pages 243, 244, and 245. He  
3 ought to have answered those questions, which did not, as  
4 phrased, seek privileged information.

5           So Rosenberger's request on this issue is granted,  
6 consistent with what I just said. Rosenberger's counsel may  
7 take another one-hour deposition of Mr. Bisiules on -- to ask  
8 what he did and what he searched to seek documents relevant  
9 to this litigation and what efforts he made to preserve  
10 documents that might be relevant. Or counsel may work out a  
11 declaration answering these questions, if Rosenberger  
12 prefers, but that's Rosenberger's choice.

13           All right? That's the last issue.

14           Is there anything else the parties wish to raise,  
15 Mr. Kahnke?

16           MR. KAHNKE: Just one thing, Your Honor, you've  
17 directed additional documents to be produced. We do have a  
18 deadline coming up for expert reports.

19           THE COURT: Right.

20           MR. KAHNKE: I don't know if we might request a  
21 specific deadline by which that information be produced or  
22 get guidance from the Court.

23           THE COURT: Yeah. I mean, that and we're reopening  
24 some depositions, so I don't know how that squares with your  
25 existing expert reports. I don't know what overlap there is

1 between expert and fact discovery.

2 So I'm going to issue my order -- I don't like to  
3 just pick out of a vacuum, dates for production. I like them  
4 to be realistic.

5 So why don't counsel confer -- you know, or counsel  
6 might appeal. So this is what I'm going to do. I'm going to  
7 memorialize really in bare-bones form in an order what the  
8 bottom line is of what I held. This transcript will be  
9 prepared. This will be my oral opinion supporting it. I  
10 won't put dates, and you take what I did and confer with one  
11 another and come up with a timeline and compare it to the  
12 expert reports and -- you know a lot more about all that than  
13 I do of how it's going to affect expert. Send me a  
14 subsequent submission, preferably joint, about dates and how  
15 the expert schedule is affected.

16 I think I just pushed out the expert schedule by  
17 quite a bit. So...

18 MR. KAHNKE: Understood. Thank you.

19 THE COURT: All right.

20 Mr. Filardo, anything else?

21 MR. FILARDO: Nothing further from defendants,  
22 Your Honor.

23 THE COURT: Okay. Thank you. We're off the  
24 record.

25 (Conclusion of proceedings)

Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 103 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ *Sara L. Kern*

1st of February, 2024

Signature of Approved Transcriber

Date

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